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# Reconcilable Differences? The Interpretation of Multilingual Treaties

By DINAH SHELTON\*

*"[Y]ou should say what you mean," the March hare went on.  
"I do," Alice hastily replied; "at least—at least I mean what I say—  
that's the same thing, you know."*

*"Not the same thing a bit!" said the hatter. "You might just as well  
say that 'I see what I eat' is the same thing as 'I eat what I see!'"<sup>1</sup>*

*What is translation? On a platter  
A poet's pale and glaring head,  
A parrot's screech, a monkey's chatter,  
And profanation of the dead.<sup>2</sup>*

## I. Preface

*As a professor, Stefan Riesenfeld has as many ways of teaching and inducing excellence in scholarship as there are days of instruction. One indelible lesson was imparted to a second-year law student in 1968 during mock hearings on Senate advice and consent to ratification of the United Nations Convention on Elimination of All Forms of Racial Discrimination. When the student began by asserting the absence of Constitutional problems with ratification, 'Senator' Riesenfeld interrupted: "Have you read the Russian text of the treaty?" Pause. "No, sir." He persisted: "Have you read any authentic text of the treaty other than in English?" "No, sir." "Then neither you nor we can possibly be certain of the merits of anything you say concerning this treaty." Lesson learned.*

Legal certainty, predictability, and conflict avoidance require the greatest clarity and precision in the drafting of legal texts. Those governed must be made aware of their rights and obligations. Yet, language as a means of communication is fraught with ambiguities,

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1. LEWIS CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 95 (Martin Gardner ed., Penguin Books 1970) (1898).

2. Vladimir Nabokov, *On Translating "Eugene Onegin,"* quoted in GEORGE STEINER, *AFTER BABEL: ASPECTS OF LANGUAGE AND TRANSLATION* 240 (1975).

mistakes, and deception.<sup>3</sup> These problems may be alleviated or exacerbated by drafting texts in multiple languages.<sup>4</sup> On the one hand, a comparison of different texts may help to resolve an ambiguity inherent in a term or phrase used in one language, making clearer the intention of the drafters. Regarding treaty interpretation, the International Law Commission (ILC) has noted that "when the meaning of terms is ambiguous or obscure in one language but it is clear and convincing as to the intentions of the parties in another, the plurilingual character of the treaty facilitates interpretation of the text the meaning of which is doubtful."<sup>5</sup> During the negotiating process, drafting in several languages also can bring to light questions of substance, indicating the need for further efforts to reach agreement.<sup>6</sup> On the other hand, the lack of precise linguistic equivalents and differences in legal systems throughout the globe make it virtually certain that multiple language versions will include terminological differences that lead to conflicting interpretations of the text.<sup>7</sup> The probability of errors in translation or misunderstandings in negotiations increases as additional languages are added to the number of authentic texts. These problems can have important consequences for multilingual treaties, where the degree to which obligations are understood is crucial to compliance.<sup>8</sup>

The present Article examines the problem of interpreting multilingual treaties where mistaken or deliberate mistranslations result in conflicting versions of the treaty text.<sup>9</sup> The Article then discusses some possible methods to avoid or resolve linguistic inconsistencies.

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3. See generally *id.*; LANGUAGE DU DROIT ET TRADUCTION: ESSAYS ON JURILINGUISTIQUE (Jean Claude Gemar ed., 1982).

4. On the meaning of "authentic," see Shabtai Rosenne, *The Meaning of "Authentic Text" in Modern Treaty Law*, in VOLKERRECHT ALS RECHTSORDNUNG INTERNATIONALE GERICHTSBARKEIT MENSCHENRECHTE: FESTSCHRIFT FÜR HERMANN MOHLER 759 (Rudolf Bernhardt et al. eds., 1983).

5. *Draft Articles on the Law of Treaties with Commentaries, Report of the ILC to the General Assembly on the Work of its 8th Session*, [1966] 2 Y.B. Int'l L. Comm'n 224, art. 29, para. 6, U.N. Doc A/6309/Rev.1 [hereinafter ILC Commentary].

6. SHABTAI ROSENNE, *THE LAW OF TREATIES: A GUIDE TO THE LEGISLATIVE HISTORY OF THE VIENNA CONVENTION* 36 (1970).

7. These difficulties have given rise to the *postulate of untranslatability* ("Nichübersetzbarkeit," "intraduisibilité"), the conviction that "there can be no true symmetry, no adequate mirroring, between two different semantic systems." STEINER, *supra* note 2, at 239. See also WOLFRAM WILSS, *ÜBERSETZUNGSWISSENSCHAFT: PROBLEME UND METHODEN* 74 (1977); see generally GEORGES MOUNIN, *LES PROBLEMES THEORIQUES DE LA TRADUCTION* (1963).

8. Abram Chayes & Antonia Chayes, *On Compliance*, 47 INT'L ORCI. 175, 188 (1993).

9. For two earlier extensive studies of this problem, see ALEXANDER OSTROWER, *LANGUAGE, LAW AND DIPLOMACY - A STUDY OF LINGUISTIC DIVERSITY IN OFFICIAL*

Applying Articles 31-33 of the Vienna Convention on the Law of Treaties, the Article suggests that the general rule of interpretation that gives primacy to the "plain meaning" of terms will often fail to reconcile discordant texts, where the presumption of conformity is rebutted. Thus, those interpreting the provision must have recourse to subsidiary means of interpretation, in particular the drafting history and the negotiating text as the accurate expression of the drafters' intent. In all instances, negotiators need to devote more attention to improved drafting in general and to ensuring concordance between the various authentic texts. Where possible, all language versions should be negotiated simultaneously, and not left for later translation. When the latter does occur, the translations should be denominated "official" and not "authentic" texts, to make clear that they were not agreed to and approved during the drafting of the original instrument.

## II. State Practice

Language diversity reflects the many cultures and societies of the world, bringing a richness of thought and imagery to the human experience. Language is also inextricably intertwined with nationality and nationalism<sup>10</sup> and, as such, can be a divisive political issue, among the most "potentially threatening causes of social disintegration."<sup>11</sup> Internationally, language differences lead to competition of place and arguments over relative merit, insistence on equality<sup>12</sup> or preferential treatment in international organizations and diplomatic discourse.<sup>13</sup>

Equality of states implies the right of each state to use the language of its choice in concluding treaties.<sup>14</sup> Until the twentieth cen-

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INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (2 vols. 1965), and MALA TABORY, *MULTILINGUALISM IN INTERNATIONAL LAW AND INSTITUTIONS* (1980).

10. See OSTROWER, *supra* note 9, at 37-38.

11. William R. Beer & James E. Jacob, *Introduction to LANGUAGE POLICY AND NATIONAL UNITY 2* (William R. Beer & James E. Jacob eds., 1985). See generally LINGUISTIC MINORITIES, POLICIES AND PLURALISM (John Edwards ed., 1984); KENNETH D. McRAE, *CONFLICT AND COMPROMISE IN MULTILINGUAL SOCIETIES* (Kenneth D. McRae ed., 1986); RONALD WARDHAUGH, *LANGUAGE AND NATIONHOOD* (1983).

12. In 1973, proponents succeeded in adding Arabic to the list of official languages at the United Nations. See TABORY, *supra* note 9, at 11-14.

13. Debates at the United Nations have occurred on the issue of whether the alphabetical order for rotating the presidency of the Security Council should follow the English or the French spelling of names. See generally SYDNEY B. BAILEY, *THE PROCEDURE OF THE UN SECURITY COUNCIL* (1975). More recently, debates over the election of the Secretary-General of the United Nations reflected French desire for a francophone candidate.

14. ARNOLD MCNAIR, *THE LAW OF TREATIES* 30 (1961) (Parties are free to choose the language in which a treaty is expressed).

tury, treaties were generally written in the *lingua franca* of the period and place. In the ancient eastern Mediterranean, diplomacy was conducted and treaties concluded in Sumerian, Akkadian and, later, Greek.<sup>15</sup> From the height of the Roman empire until the eighteenth century, European treaties were concluded in Latin.<sup>16</sup> Eventually, French replaced Latin and for nearly two centuries French remained the dominant language of international relations, at least in the West.<sup>17</sup> The fact that French was a national language, unlike Latin, did cause some caution in drafting, as seen in the General Treaty of the Congress of Vienna, which expressly observed that the exclusive use of the French language in the treaty was not to be construed as a precedent for the future, and that every Power reserved the right to adopt, in future negotiations and conventions, the language that it had previously employed in diplomatic relations.<sup>18</sup>

In spite of French predominance, the United States and the United Kingdom were early proponents of English. In transmitting to the United States Senate a 1785 consular treaty with France, John Jay recommended that "in the future, every treaty or convention which Congress might think proper to engage in should be formally executed

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15. For example, in 1279 B.C. the Egyptians and Hittites concluded their Treaty of Peace and Alliance in Akkadian, the language of Babylonia. ARTHUR NUSSBAUM, *CONCISE HISTORY OF THE LAW OF NATIONS* 2 (1954).

16. The Treaty of Westphalia, for example, was drafted and signed in Latin. Treaty of Westphalia, Jan. 11, 1649, Fr.-Holy Roman Empire, 1 Consol. T.S. 383. See also HAROLD G. NICOLSON, *DIPLOMACY* 231 (1939); CHARLES C. HYDE, *INTERNATIONAL LAW: CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES* 1422 (1945). For many centuries Latin was the only written language in Western Europe. Jean Hardy, *The Interpretation of Plurilingual Treaties by International Courts and Tribunals*, 37 BRIT. Y.B. INT'L L. 72 (1961) [hereinafter Hardy]. Latin was also used further east, in negotiations between Russian and China in 1675-1680. See Werner E. Weisflog, *Problems of Legal Translation*, in SWISS REPORTS PRESENTED AT THE XII<sup>TH</sup> INTERNATIONAL CONGRESS OF COMPARATIVE LAW 7, 184 n.21 (1986).

17. The predominance of French was sometimes explained, even by English speakers as late as 1939, as being due to its inherent superiority:

It is impossible to use French correctly without being obliged to place one's ideas in the proper order, to develop them in a logical sequence, and to use words of almost geometrical accuracy. [I]t may be regretted that we are discarding as our medium of negotiation one of the most precise languages ever invented by the mind of man.

NICOLSON, *supra* note 16, at 234. See also JAMES B. SCOTT, *LE FRANCAIS, LANGUE DIPLOMATIQUE MODERNE* 129 (1924).

18. LASSA F. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* (Hersch Lauterpacht ed., 8th ed. 1955) 771-72. According to Hardy, the very fact that French was a national language prevented it from attaining the same degree of universality as Latin. Hardy *supra* note 16, at 72.

in two languages.”<sup>19</sup> Nonetheless, at the 1919 Peace Conference, English had “a difficult struggle for recognition.”<sup>20</sup> Ultimately, the Treaty of Versailles was concluded with authentic versions in English and French.<sup>21</sup>

The development of international law during the present century has witnessed increasing use of multiple languages in the conclusion of treaties. The common practice today is to have bilateral treaties written in the language of the two parties, and sometimes in a third language (usually either French or English).<sup>22</sup> Multilateral treaties are often authenticated in all the official languages of the sponsoring organization. As noted by the ILC, “[t]he phenomenon of treaties drawn up in two or more languages has become extremely common and, with the advent of the United Nations, general multilateral treaties drawn up, or finally expressed, in five different languages have become quite numerous.”<sup>23</sup>

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19. JOHN B. MOORE, *A DIGEST OF INTERNATIONAL LAW* 180 (1906). Current practice of the United States generally follows Jay's recommendation. See TABORY, *supra* note 9, at 124.

20. *Id.* at 5 (citing HUNTER MILLER, *THE DRAFTING OF THE COVENANT* (1928)).

21. Treaty of Peace with Germans, June 28, 1919, art. 440, 11 MARTENS NOUVEAU RECUEIL (ser. 3d) 323, 225 CONSOL.T.S. 188 (entered into force Jan. 10, 1920) [hereinafter Treaty of Versailles]. In drafting the Statute for the Permanent Court of International Justice (P.C.I.J.), there was support for making French the official language of the Court. OSTROWER, *supra* note 9, at 319, 366-71. Ultimately, the Statute of the P.C.I.J. was adopted in French and English, although the French version was often viewed as authoritative. I SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 45 n.1 (1965). Hardy notes that while the Treaty of Versailles was drawn up in French and English, only one of the five peace treaties at the end of the Second World War included an authentic text in French. Hardy, *supra* note 16, at 72. Article 111 of the United Nations Charter provides that its text is equally authentic in Chinese, English, French, Russian, and Spanish. U.N. CHARTER art. 111.

22. John K. Gamble & Charlotte Ku, *Choice of Language in Bilateral Treaties: Fifty Years of Changing State Practice*, 3 INDIANA INT'L & COMP. L. REV. 233 (1993). At the United Nations, the Treaty Section often receives international agreements concluded in languages other than English and French, which are the official languages of the Secretariat. Mala Tabory, *Recent Developments in United Nations Treaty Registration and Publication Practices*, 76 AM. J. INT'L L. 350, 351 (1982). This practice continues in spite of the General Assembly urging that states provide the Secretary-General, when possible, with translations in English or French, or both. GA Res. 482 (v), para. 2, U.N. GAOR 6th Comm., 5th Sess., 320th plen. mtg., Supp. No. 20, at 76, U.N. Doc. A/1755 (1950); GA Res. 1092 (XI), para. 3, U.N. GAOR 5th Comm., 11th Sess., 662 plen. mtg., Supp. No. 17, at 47, U.N. Doc. A/3572 (1957). In such cases, the registered agreements are translated into those languages by the Translation Services. A treaty appears in the United Nations Treaty Service in all its authentic languages, as well as in English and French. The U.N.T.S. also includes any official translations required by the formal clauses of a treaty.

23. ILC Commentary, *supra* note 5, at 224-26, para. 1. With the 1973 addition of Arabic as an official language, United Nations treaties are normally concluded today in six languages.

Regional international organizations and institutions face the same problem as confronts the United Nations. The Organization of American States has four official languages, although the working languages are Spanish and English.<sup>24</sup> French and English are the official languages of the Council of Europe, although other languages are used by members of the Parliamentary Assembly and by parties to proceedings before the European Commission and the Court of Human Rights.<sup>25</sup> The three treaties forming the original European Communities adopted different solutions for the language issue. The 1951 European Coal and Steel Community had a single authentic text in French. The later treaties establishing the European Atomic Energy Community and the European Economic Community were drafted in the four languages of the parties and all expressly deemed to be of equal value.<sup>26</sup>

The EC's first regulation addressed language, declaring that the "official languages and working languages of the institutions" were the four treaty languages, that the Community shall communicate with a Member State in that State's official language, that an individual communicating with a Community institution may use any of the official languages and receive reply in that language, and that the Official Journal and all official acts of general application were to be published in all four languages.<sup>27</sup>

The Acts of Accession of new members each contain provisions extending official status to their language.<sup>28</sup> The practice has been

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24. The other official languages are French and Portuguese. Organization of American States Charter, Apr. 30, 1948, art. 144, 119 U.N.T.S. 48 (entered into force Dec. 13, 1951); revised, Protocol of Amendment to the Organization of American States Charter, Feb. 27, 1967, 1 O.A.S.T.S. 37.

25. Rule 30, Rules of Procedure of the European Commission on Human Rights, *reprinted in* LUKE CLEMENTS, *EUROPEAN HUMAN RIGHTS TAKING A CASE UNDER THE CONVENTION* app. 3 at 243, 243 (1994); Rule 27, Rules of Court, European Court of Human Rights, *reprinted in id.* app. 5 at 265, 270.

26. TREATY ESTABLISHING THE EUROPEAN COMMUNITY art. 248, Feb. 7, 1992, O.J. (C 224) 1 (1992), [1992] 1 C.M.L.R. 573 (1992) ("The present Treaty, drawn up in a single original in the German, French, Italian and Netherlands languages, all four texts being equally authentic . . ."); TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, art. 225, 298 U.N.T.S. 167.

27. Council Regulation 1/58 of 15 Apr. 1958 On the Use of Languages in the European Economic Community, 1958 J.O. (17) 385. See L. Neville Brown, *The Linguistic Regime of The European Communities: Some Problems of Law and Language*, 15 VAL. U. L. REV. 319, 320 (1981).

28. Act on the First Accession, art. 155, 1972 J.O. (L 73) 45; Act on the Second Accession, art. 147, 1979 O.J. (L 291) 50; Act on the Third Accession, art. 397, 1985 O.J. (L 302) 138.

claimed to have a normative basis: "Since the constituent Treaty (now the Treaty on European Union, as modified by the Act of Accession) is a public international law instrument, it is self-evident that it must exist in all the official languages of the signatories, each having equal authenticity (*i.e.*, equal value and authority)."<sup>29</sup> This assertion, which mistakenly derives mandatory rather than permissive language usage from the principle of equality of states, is not supported by state practice in concluding multilateral treaties, even within the EU. Since 1995 there are twelve official and eleven working languages in the EU.<sup>30</sup> Each language can be consulted on questions of interpretation, but older legal documents and the Treaty of Rome remain in the original four official languages. The European Union regards equality among the languages of the member states as crucial to its unity. In addition, legal certainty and equality requires that all those governed by EU law are bound to the same behavior and know what that is. EU law is often directly applicable to individuals or companies in member states. Access to the law in a language understood by those it governs is considered a fundamental principle. In addition, the European Convention on Human Rights forbids discrimination on the basis of language and specifies linguistic rights in some judicial proceedings.<sup>31</sup>

These principles require harmonization of the different language versions of EU texts. The Council and Commission often revise texts to harmonize divergent language versions<sup>32</sup> In addition, the courts of the member states and ultimately the European Court of Justice must reconcile and harmonize EC law. Overall, Pescatore calls the multi-

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29. Roger J. Goebel, *European Union Grows: The Constitutional Impact of the Accession of Austria, Finland, and Sweden*, 18 FORDHAM INT'L L.J. 1092, 1135 (1995).

30. Treaty between the Community and the Acceding States art. 3, 1994 O.J. (C 241/9) 14, substituted by Decision of the Council of Jan. 1 1995 art. 1, 1995 O.J. (L 1/1) 1. At present there are 15 member states in which 17 languages are commonly spoken: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. Austria, Sweden, and Finland joined in 1995. The official languages are Danish, Dutch, English, Finnish, French, German, Greek, Irish (Gaelic), Italian, Portuguese, Spanish, and Swedish. Irish is not a working language.

31. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, arts. 14, 5(2), 6 (3), 213 U.N.T.S. 222, 226-32. The Convention itself is authentic in French and English, while it is applicable across Europe from Iceland in the west to Turkey in the east, with Russian ratification pending.

32. See, e.g., Commission Regulation 2246/90 1990 O.J. (L 203) 50 (correcting errors in German and Italian versions of a regulation on wine commerce); Commission Regulation 3107/89 1989 O.J. (L 298) 15 (amending the Spanish version of a regulation on accession compensatory amounts); Commission Regulation 1622/87, 1987 O.J. (L 150) 30 (requiring corrections to the non-Spanish versions of a wine commerce regulation).



lingualism a "congenital" problem, "le prix qu'on paie pour la compréhension mutuelle et la paix linguistique."<sup>33</sup>

In their daily work, the EC Commission, Council and Court are influenced by their locations, all of which are in French-speaking countries.<sup>34</sup> French is thus largely the working language of Community institutions, although the influence of English is increasing. The Court's rules of procedure explicitly place the languages on an equal footing, but all the Court's documents are drafted in French and then translated.<sup>35</sup> Officially, in each proceeding, there is a language of the case.<sup>36</sup> In principle this is determined by the applicant.<sup>37</sup> In Article 177 proceedings, the language of the case is that of the national court which referred the question.<sup>38</sup>

### III. Problems in Interpreting Multilingual Treaties

The problems that arise from language differences have long been the subject of discussion.<sup>39</sup> Montaigne writes: "La plupart des

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33. Pierre Pescatore, *Interpretation des lois et conventions plurilingues dans la Communauté européenne*, 25 LES CAHIERS DE DROIT 989 (1984). On the language problem in the EC, see Hans Dölle, *Zur Problematik mehrsprachiger Gesetzes- und Vertragstexte*, 26 RABELS ZEITSCHRIFT 4 (1961); Lisbeth Stevens, *The Principle of Linguistic Equality in Judicial Proceedings and in the Interpretation of Plurilingual Legal Instruments: The Regime Linguistique in the Court of Justice of the European Communities*, 62 Nv. U. L. REV. 701 (1967); S.A. Dickschat, *Problèmes D'interprétation Des Traités Européens Résultant De Leur Plurilinguisme*, [1968] REV. BELGE DE DROIT INT'L 40; Kurt Lipstein, *Some Practical Comparative Law: The Interpretation of Multi-lingual Treaties with Special Regard to the EEC Treaties*, 48 TUL. L. REV. 907 (1973-74); M. Emile Knops, *De L'interprétation Terminologique Des Conventions Internationales Multilingues*, [1975] JOURNAL DES TRIBUNAUX 421.

34. The Council and Commission are in Brussels, the Court in Luxembourg, and the Parliament in Strasbourg.

35. Carl O. Lenz, *The Court of Justice of the European Communities*, 14 EUR. L. REV. 127, 131 (1989).

36. Article 31 of the Rules of Procedure of the Court of Justice states that the authentic language of the judgment is the language of the case. Rules of Procedure of the Court of Justice of the European Communities of June 19, 1991, arts. 31, 1991 O.J. (L 176/7) 13-14.

37. Article 29 indicates that the language of the case is usually the language of the applicant to the Court or the referring judge in an Article 177 proceeding. *Id.*

38. *Id.*

39. Apart from the problems discussed *infra*, the financial costs of translation are enormous. In the EC, about 12 percent of total personnel employed by the EC are interpreters and translators. COMMISSION OF THE EUROPEAN COMMUNITIES, TWENTY-SIXTH GENERAL REPORT ON THE ACTIVITIES OF THE EUROPEAN COMMUNITIES 1992, at 379, sec. 1107 (1993). The Commissioner in charge of staff estimated in July 1994 that the Commission alone would need 300 new translators and 75 new interpreters to deal with Finnish, Norwegian and Swedish. Comm'n Press Rel. IP (94) 676 (July 19, 1994), summarized in Common Mkt. Rep. (CCH) sec. 97,504, at 53,528. In 1987, the Commission spent approxi-

occasions des troubles du monde sont grammairiennes. Nos procès ne naissent que du débat de l'interprétation des lois; et la plupart des guerres, de cette impuissance de n'avoir su clairement exprimer les conventions et traités d'accord des princes."<sup>40</sup> Exact equivalents are not often found in different languages and thus perfect translations can rarely be made. The problems of translation are especially difficult regarding legal texts drafted to govern different legal traditions and systems. The term "droit subjectif" has no equivalent in English; administrative law does not mean the same thing in civil law countries as it does in common law systems.<sup>41</sup> There may be "cultural untranslatability" with terms like "Rechtsstaat" or "common law," terms that are rooted in the political and legal history of a particular country. Terminology may be used that has particular meaning or definition in the legislation of each country. Tax treaties, for example, have to deal with terms like "income," "spouse," "dependent," and "national."<sup>42</sup>

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mately one-third of its \$2 million annual budget on translation. *Id.* Until recently, the Court of Justice had a two year delay in the publication of reports of its judgments due to translation difficulties. Goebel, *supra* note 29, at 1138. Yet, in its 1992 report, *Europe and the Challenge of Enlargement*, the Commission concluded that "for reasons of principle, legal acts and important documents should continue to be translated into the official languages of all Member States." *Europe and the Challenge of Enlargement*, 25 E.C. BULL. at 16 (supp. 1992). The financial implications of multilingual services at the United Nations are discussed in TABORY *supra* note 9, at 41, 146.

40. 2 MICHEL DE MONTAIGNE, LES ESSAIS 12 (Editions Slatkine 1987) (1588). (The English translation reads: Most of the instances of the world's troubles are grammatical. Our trials would not arise but for the debate over laws' interpretation; and most wars arise from an inability to know how to clearly express the conventions and treaties of princes.)

41. Compare the definition of administrative law in Black's Law Dictionary 46 (6th ed. 1990) ("That body of law created by administrative agencies in the form of rules, regulations, orders, and decisions . . .") with that contained in 2 André De Laubadère, *Traité de Droit Administratif* 11 (7ième ed. 1980).

42. It should be noted that problems also arise with interpretation and application of treaties authenticated in a single language, when the provisions must be applied by tribunals unfamiliar with the language. U.S. Courts have had difficulty with the French term "*lesion corporelle*" which appears in Article 17 of the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, 22-23 (1933), as originally drafted in French. Article 17 establishes a cause of action for injured air travelers. In interpreting the term, the courts have looked to the French law of damages, in spite of a lack of evidence that the Convention intended the term to refer to French law. See Gregory C. Sisk, *Recovery for Emotional Distress Under the Warsaw Convention: The Elusive Search for the French Legal Meaning of Lesion corporelle*, 25 TEX. INT'L L.J. 127 (1990). The U.S. Supreme Court has said that because the original text of the Warsaw convention is in French, it is appropriate to "look to the French legal meaning for guidance" in interpreting it. *Air France v. Saks*, 470 U.S. 392, 399 (1985). The Court also said that this did not mean that the interpretation of the Warsaw convention was to be "forever chained to French law." *Id.* From the drafting history, it is not at all clear that the parties intended French law to control the meaning

Yet another problem flows from the natural tendency to use the same word in several languages, although the meaning of the word differs considerably from one language to the other. The problem of these *faux amis* can be seen in the English and French words *infant*, *demand[er]*, *tort*, *preservatives* or in the French/Spanish homonyms *gateau/gato*.<sup>43</sup>

Thus, even under the best of circumstances there are problems with achieving concordance between legal texts in different languages. And circumstances are frequently not the best. The procedures by which multilingual texts are drafted vary widely, and often increase the probability of error. To this must be added instances where deliberate ambiguity or mistranslation is inserted due to lack of agreement over the substance of the text.

A large number of multilateral treaties are drafted at conferences convened for the purpose. Some of these designate both official and working languages. At the Vienna Conference on the Law of Treaties, for example, English, French and Spanish were the working languages. All three, plus Chinese and Russian, were official languages. While summary records and all documents were made available in the working documents, only important documents were issued in all the official languages.<sup>44</sup> In the UNEP-sponsored drafting of the Mediterranean regional sea agreement, working groups, meetings of experts and preparatory groups used either French or English. At intergovernmental meetings and the plenary Conference, four languages were used, but resolutions were adopted in English and French, then immediately translated into Arabic and Spanish.<sup>45</sup> Finally, the conference that drafted the Protocols Additional to the 1949 Geneva Conventions began with a preparatory meeting at which French, English, and Spanish were designated as the working languages. The Secretariat was responsible for translations.<sup>46</sup> At the subsequent Conference, Arabic, Chinese, English, French, Russian and Spanish became the official

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of the terms in the international agreement simply because French was chosen as the language of the agreement.

43. A memorable example of translating error can be seen in the French subtitle of a John Wayne movie set during World War II. Pointing to the horizon, a character in the film yells "tanks!" The subtitle reads "merci!"

44. *United Nations Conference on the Law of Treaties, Rules of Procedures*, Comm. of the Whole, 1st Sess., 1st plen. mtg., Rules 55-56, at xvi, xxx (1968).

45. TABORY, *supra* note 9, at 34.

46. International Committee of the Red Cross (ICRC), *Conference of Governmental Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Second Session, in 1 REPORT ON THE WORK OF THE CONFERENCE 23-24 (1972).

languages. The two Protocols adopted by the Conference are equally authentic in the six languages.

There is similar variation in regard to treaties drafted by the United Nations. The original text of the Genocide Convention<sup>47</sup> was in French, while the Convention on the Elimination of Racial Discrimination<sup>48</sup> began in English, with later amendments suggested to reconcile the different language texts. Translations are usually done by the UN Secretariat. In the case of the Genocide Convention, the Chinese and Spanish versions may not have been completed at the time the General Assembly adopted the Convention designating all five versions as "equally authentic."<sup>49</sup>

Errors in translation may occur when negotiators insist on the need to complete translations by the time a treaty is concluded and adopted, thereby rushing the process. Mistakes also occur when translations are undertaken after the negotiations are completed and delegates are no longer there to ensure that the sense of the agreement is maintained in the translations. The mistakes can be quite significant. In the translation to Russian of the 1977 Protocols to the Geneva Conventions of 12 August 1949, several errors were made, including the omission of the entire text of point (e) to Article 4(3) of Protocol II.<sup>50</sup>

Apart from mistakes, multilingual treaties can differ due to deliberate actions of negotiators. An example of this is found in the Bonn Convention on Migratory Species.<sup>51</sup> In the English version, the second paragraph of the Preamble states that each generation "holds the resources of the earth for future generations and has an *obligation* to ensure that this legacy is conserved and, where utilized, is used wisely."<sup>52</sup> The French text contains the less firm *mission* for the English *obligation*. The initial draft was in English. During the negotiations, a French representative proposed to "correct" the French text,

47. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

48. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

49. TABORY, *supra* note 9, at 95.

50. The omission was corrected in the new text published by the ICRC in 1994. In Additional Protocol I, the Russian text omits the word "three" in its translation of the following phrase from Article 56(7): "with a special sign consisting of a group of three bright orange circles placed on the same axis . . . ." This mistake has not been corrected.

51. Convention on the Conservation of Migratory Species of Wild Animals, June 23, 1979, 19 I.L.M. 11 (1980). The authentic languages are English, French, German, Russian, and Spanish.

52. *Id.* at 15-16 (emphasis added).

which originally used the term *obligation* to correspond to the English.<sup>53</sup> The English-speaking chairman of the meeting deferred to the French suggestion on the appropriate French term to be used. Later, during the final stylistic editing of the text, the same French delegate "found" that the English and French versions did not correspond and proposed to change the English to conform to the French, thereby weakening both texts. After other delegates objected the treaties were concluded with the inconsistency remaining in the text.<sup>54</sup>

Disagreement over substance can also lead to circumlocutions or poor drafting in the original, making translation that much more difficult. The very title of an international text that is not a treaty, the *Non-Legally Binding Authoritative Statement of Principles For a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests* is a case in point.<sup>55</sup> Even where there is consensus, the cumbersome drafting process of large international conferences and the lack of skill of many involved in the drafting process can produce a text that borders on incoherence:

Governments at the appropriate level, with the assistance of international and regional organizations and with the support of non-governmental organizations, the private sector and academic and scientific institutions, should improve both plant and animal breeding and micro-organisms through the use of traditional and modern biotechnologies, to enhance sustainable agricultural output to achieve food security, particularly in developing countries, with due regard to the prior identification of desired characteristics before modification, taking into account the needs of farmers, the socio-economic, cultural and environmental impacts of modifications and the need to promote sustainable social and economic development, paying particular attention to how the use of biotechnology will impact on the maintenance of environmental integrity.<sup>56</sup>

Due to the various problems, from those inherent in the process of translation to mistakes and deliberate mistranslations, notable discrepancies exist in different versions of treaty texts. In addition to the

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53. Interview by the author with a participant in the negotiations. There are no *proces verbal* of the drafting process.

54. The German version uses *verpflichtet* for *obligation*.

55. *Statement of Forest Principles*, in UNITED NATIONS, AGENDA 21: THE UNITED NATIONS PROGRAMME OF ACTION FROM RIO 291, U.N. Doc. [ST/]DPI/1344 (1993).

56. *Id.* at 137, para. 16.4. Poor use of language carries over into translations. In the General Assembly, French translations have been called "ponderous" and "sometimes so unclear that delegations were obliged to turn to the English original to clear up their queries." U.N. GAOR 5th Comm., 23rd Sess., 1287th mtg. at para. 53 (1968).

examples given above, article 6(1) of the European Convention on Human Rights<sup>57</sup> poses problems. Soon after its entry into force, a German appellate court held that decisions of administrative tribunals did not have to be pronounced publicly because Article 6 applied only to civil and criminal courts.<sup>58</sup> The conclusion was partly based on the German text of Article 6(1) that erroneously translated the English text.<sup>59</sup> Moreover, as Verdross has noted, even the English and French texts of the Convention are not always concordant.<sup>60</sup>

#### IV. Resolution of Conflicts through Drafting

It is highly unlikely that states will draft treaties in a single language in the future,<sup>61</sup> however many commentators would join the author in calling for a return to Latin.<sup>62</sup> In the absence of agreement to end the practice of multilateral treaty drafting, other means of limiting textual conflict must be sought. One solution is to abandon the notion of equality among authoritative texts and designate one to govern in case of divergence.<sup>63</sup> Another is to draft an interpretive rule to apply in case a problem arises. This is rarely done, but an example can be found in an extradition agreement between Austria-Hungary and It-

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57. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 31.

58. 9 NEUE JURISTISCHE WOCHENSCHRIFT 1374, 1375 (1956). For the approach of the European Court of Human Rights on this text, see *infra* notes 95-97 and accompanying text.

59. Only the French and English texts are authentic. On the German text, see Thomas Buergenthal, *Comparison of the Jurisprudence of the Organs of the Convention as Regards the Rights of the Individual in Court Proceedings*, in HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW (Arthur H. Robertson ed., 1968).

60. Alfred Verdross, *Status of the European Convention in the Hierarchy of Rules of Law*, in HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW, *supra* note 59, at 54.

61. While there is no move to single language drafting, the recent rules of procedure adopted by the EC Economic and Social Committee on July 6, 1995 try to limit the impact of having 12 official languages in the EC. Economic and Social Committee, Rules of Procedure, 1996 O.J. (L 82) 12. Rule 36(J) provides that study groups of the Committee may work in four languages, to be determined by the president before the first meeting according to the study group's composition. *Id.* The language of the rapporteur may be added if it is not among the four languages selected. *Id.*

62. A return to Latin has been debated in the European Parliament with one member speaking in Latin. 15 LANGUAGE PROBS. & LANGUAGE PLAN 327-28 (1991). An artificial language such as Esperanto was sometimes suggested in the past but has little support today. PETER G. FORSTER, THE ESPERANTO MOVEMENT (Contributions to the Sociology of Language Series No. 32, Joshua A. Fishman ed., 1982). See also ANDREW LARGE, THE ARTIFICIAL LANGUAGE MOVEMENT (1985).

63. See ILC Commentary, *supra* note 5, art. 29, paras. 3, 1. See also examples in THE TREATY MAKER'S HANDBOOK 254-55 (Hans Blix & Jirina H. Emerson eds., 1973).

aly, signed at Florence on February 27, 1869. Appended to the treaty is a declaration in French:

Que les deux textes de la Convention, savoir le texte allemand et le texte italien, doivent etre consideres comme egalement authentiques, et que s'il pouvait se trouver une divergence entre ces deux textes, de meme que s'il surgissait un doute sur l'interpretation d'un passage quelconque, l'on suivra l'interpretation la plus favorable a l'extradition du prevenu.<sup>64</sup>

The 1951 United Nations Convention on Refugees provides another possible approach. When the English term "return" was deemed inadequate to express the French *refouler*, the latter term was placed in the English text in parentheses, indicating that its meaning should control.

To solve the problems of terms with specific meanings in different legal systems, the UK-Swiss tax treaty adopts a type of *renvoi* to local law: "As regards the application of the Convention by a Contracting State any term not defined herein shall, unless the context otherwise requires, have the meaning which it has under the law of that State concerning the taxes which are the subject of the Convention."<sup>65</sup>

Many multilateral treaties are including an article near the beginning of the text containing a lengthy set of definitions, to try to limit language problems.<sup>66</sup> As long as the definitions themselves do not contain translation errors, this can alleviate some problems of terminology.

During the negotiations for the 1982 United Nations Convention on the Law of the Sea, the Drafting Committee created a new system for multilingual drafting, which appeared to resolve many potential

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64. 1 MARTENS NOUVEAU RECUEIL (ser. 2d) 344 (1967). (The English translation reads: That the two texts of the Convention, the German text and the Italian texts, are to be considered to be equally authentic, and if discrepancy between the two texts, or if a doubt could arise about the interpretation of any passage whatsoever, we will follow the interpretation that is the most favorable to the extradition of the accused.)

65. Convention between the United Kingdom of Great Britain and Northern Ireland and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income, art. 3.2, Dec. 8, 1977, Cmnd. 7122, *accord* OECD Model Double Taxation Convention on Income and on Capital, art. 3.2 (1977), *reprinted in* MODEL INCOME TAX TREATIES (Kees Van Raad ed., 1990).

66. *See, e.g.*, Convention on Biological Diversity, *opened for signature* June 5, 1992, art. 2, 31 I.L.M. 818, 823 (entered into force Dec. 29, 1993).

problems.<sup>67</sup> Rule 53 of the Rules of Procedure of the Conference provided the mandate for the Drafting Committee:

It shall, without reopening substantive discussion on any matter, formulate drafts and give advice on drafting as requested by the Conference or by a Main Committee, coordinate and refine the drafting of all texts referred to it, without altering their substance, and report to the Conference or to the Main Committee as appropriate. It shall have no power of or responsibility for initiating texts.<sup>68</sup>

In carrying out its responsibility, the twenty-three members of the Drafting Committee formed language groups as its subsidiary organs. The language groups of the Drafting Committee represented the six languages of the Conference: Arabic, Chinese, English, French, Russian and Spanish.<sup>69</sup> The language groups were open to all delegations whether or not they were members of the Drafting Committee. The coordinators of the six language groups met under the direction of the Chairman of the Drafting Committee, eventually in public sessions.<sup>70</sup>

The work of the Drafting Committee began with discussions in each language group, with proposals coming from members of that group, from other language groups and in some cases, from the Secretariat.<sup>71</sup> The suggestions of the group were submitted to the coordinators who in turn would make proposals for changes to the text to the Drafting Committee.<sup>72</sup> The Committee examined the proposals then made its recommendations to the Conference.

Every proposal was translated into the other five languages of the conference before submission to the meetings of the coordinators, in spite of the technical and resource problems this created. One commentator ascribes this to the need to ensure that a purported stylistic or grammatical change was in fact no more than that, exacerbated by "the atmosphere of suspicion which at times pervaded the Conference

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67. For a general discussion of the drafting process, see L.D.M. Nelson, *The Drafting Committee of the Third United Nations Conference on the Law of the Sea: The Implications of Multilingual Texts*, 57 BRIT. Y.B. INT'L L. 169 (1986).

68. THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA RULES OF PROCEDURE, at 13, U.N. Doc. A/CONF.62/30/Rev.2, U.N. Sales No. E.76.1.4 (1976).

69. *Id.* Rule 56.

70. See *Report of the Chairman of the Drafting Committee to the Plenary*, United Nations, Third Conference on the Law of the Sea, U.N. Doc. A/CONF.62/L.67/Rev.1 (1981), reprinted in 15 THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 23S, para. 2 (Renate Platzöder ed., 1988) [hereinafter UNCLOS].

71. Nelson, *supra* note 67, at 172.

72. *Id.*



itself."<sup>73</sup> The language groups reviewed all proposals for changes in other language texts in an attempt to achieve uniformity. These attempts were not always successful.<sup>74</sup> There were numerous problems arising from the scope of the topic and the multiplicity of drafting sources. The Chairman of the Drafting Committee described this:

Another one of the factors which has rendered the work of the Drafting Committee extremely complex arises from the fact that the provisions of the convention emanate from various sources . . . for instance, first, important conventions . . . ; secondly, provisions which have been the object of lengthy, difficult and delicate negotiations and which now reflect a certain delicate balance; and thirdly, provisions which have been formulated by technical experts who are not necessarily lawyers, such as hydrographers, geologists or economists, or by lawyers on technical subjects without the participation of such experts.<sup>75</sup>

In some cases, issues identified by the Drafting Committee were ignored by the Conference, perhaps concerned about reopening debate on substantive issues already exhaustively discussed. In some cases ambiguities were retained.<sup>76</sup> Thus, although this system may have made the drafters more aware of the problems, it did not eliminate them. Future efforts will be needed to reconcile the six authoritative languages of the Convention.<sup>77</sup>

Finally, as regards the poor quality of drafting in general, Jenks suggested more than fifty years ago the establishment of an international legislative drafting bureau to ensure systematic development of international law through multilateral agreements.<sup>78</sup> He called for a manual of rules of style, common forms for standard articles, a multilingual glossary, and an index of terms defined in multilateral agree-

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73. *Id.* at 172-73.

74. See the discussion, *id.* at 117-78 concerning the words "ship" and "vessel" in the English and Russian versions of the text.

75. *Report of the Chairman of the Drafting Committee*, United Nations, Third Conference on the Law of the Sea, U.N. Doc. A/CONF.62/L.56 (1980), reprinted in 13 UNCLOS, *supra* note 70, para. 8, at 95.

76. For example, the French and Spanish texts of Article 216, paragraph 1, were made to conform to the ambiguity of the English text. Nelson, *supra* note 67, at 187.

77. Article 320 of the Convention on the Law of the Sea establishes that the text of the Convention is equally authoritative in six languages: Arabic, Chinese, English, French, Russian and Spanish. Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 320, U.N. Doc. A/CONF.62/122, reprinted in 21 I.L.M. 1261, 1329.

78. C. Wilfred Jenks, *The Need for an International Legislative Drafting Bureau*, 38 AM. J. INT'L L. 163 (1945).

ments.<sup>79</sup> He did not call for a training program for negotiators in how to draft international legal texts, but the proposal complements his ideas. In 1958, he complained of "the amateurishness which remained typical of a high proportion of international drafting throughout the inter-war years, and which is not yet wholly eliminated."<sup>80</sup> He would not see much improvement in many recently drafted international texts.

Jenks supported a process very like that adopted by the Third United Nations Conference on the Law of the Sea, that is, the simultaneous drafting of all versions by the negotiators, rather than subsequent efforts to translate a single agreed version. Drafting committees should be composed of persons familiar in the languages—which he would limit to three—in which the treaty would be concluded.<sup>81</sup> In addition to the drafting techniques discussed above, Jenks's proposals merit on-going consideration.

## V. Interpretation of Multilingual Treaties

The practice of authenticating texts in several languages and the resulting linguistic conflicts<sup>82</sup> have led to efforts to find or establish rules of construction or principles of interpretation that can be used to resolve inconsistencies. Early in this century, a commentator suggested a predominantly textual approach to interpreting multilingual treaties:

If the two can, without violence to the language, be made to agree, that construction which establishes this conformity is to prevail. In case they cannot be made to harmonize, other rules of construction must be resorted to for the purpose of determining, if possible, the common intention of the parties.<sup>83</sup>

The PCIJ and ICJ have stressed the primary importance of the objective meaning of a treaty text, without entirely discounting the original intentions of the authors. In 1925, the PCIJ stated: "It is a cardinal principle of interpretation that words must be interpreted in

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79. *Id.* at 174.

80. C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* 433 (1958).

81. *Id.* at 434.

82. In addition to the examples *infra*, see generally Hardy, *supra* note 16, at 74.

83. SAMUEL B. CRANDALL, *TREATIES, THEIR MAKING AND ENFORCEMENT* 389 (2d ed. 1916).

the sense that they would normally have in their context, unless such interpretation would lead to something unreasonable or absurd.”<sup>84</sup>

The PCIJ rarely pronounced firm canons of construction to reconcile discrepancies in multilingual treaties, although the Court sometimes interpreted restrictively conventions involving the abandonment of certain rights inherent in sovereignty.<sup>85</sup> In the *Mavrommatis Palestine Concessions* case,<sup>86</sup> the PCIJ had to interpret divergent provisions in the French and English texts of the Palestine Mandate. In order to establish jurisdiction the Court had to find that the dispute arose from concessions granted in the exercise of powers the Mandatory enjoyed pursuant to the Mandate. The Court, ruling in favor of the more restricted meaning contained in the English text, stated in an oft-quoted passage:

Where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it is bound to adopt the more limited interpretation which can be made to harmonise with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.<sup>87</sup>

The Court also noted that the original draft of the instrument was probably written in English. Seeking the common ground between the parties, the Court determined that where one version is capable of two or more meanings, while the other version corresponds to one of those meanings, it is the common meaning that prevails, to the exclusion of the alternatives. This approach may suffice for bilateral, bilingual treaties, but it is questionable whether a single expression in one language should restrict the meaning of all other versions when there are four, six, or twelve languages used.

David O'Connell suggested that the *Mavrommatis* case stands for the proposition that “[w]hen a treaty is in two languages, and there is a discrepancy between them, each party is only bound by the meaning

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84. Advisory Opinion No. 11, *Polish Postal Service in Danzig*, 1925 P.C.I.J. (ser. B) No. 11, at 39. Vattel states more categorically that “il n'est pas permis d'interpeter ce qui n'a pas besoin d'interpretation.” EMER DE VATTEL, *DROIT DES GENS* § 263.

85. Prior to the Vienna Convention on the Law of Treaties, some writers supported this view. Frede Castberg, *La Methodologie Du Droit International Public*, 43 *RECUEIL DES COURS* 313, 363 (1933). Castberg stated that if two texts of a bilingual treaty are both rational, but not identical, the version to be adopted is that which imposes the lesser obligations on the parties. *Id.*; see also ROBERT REDSLOB, *TRAITÉ DE DROIT DES GENS* 95 (1950) (in case of incompatibility give precedence to the text involving “la moindre obligation”).

86. *Mavrommatis Concessions*, P.C.I.J. (ser. A) No. 2, at 19.

87. *Id.*

of the text in its own language.”<sup>88</sup> No international tribunals accept or apply this reading,<sup>89</sup> however, and it undercuts equality of obligation essential to the agreement. The only perceived advantage is that it would place the burden on negotiators to review carefully each language version for concordance, in order to ensure acceptance of the same obligations by all the parties.

The search for a common or even restrictive meaning does not always yield clear results. In the *Flegenheimer* case<sup>90</sup> before the Italian-United States Conciliation Commission, the issue involved United States claims on behalf of those who *on été traitées comme ennemis* [have been treated as enemy]. The United States interpreted the term “treat” and *traiter* as meaning “considered”, thus including some persons against whom the Italians had not taken action. The U.S. agent cited the Russian (*rassmatrivalis kak vrazheskie*) and Italian (*considerate come nemiche*) versions that supported its contention. The Commission rejected the argument, noting that the Italian version was not authentic. The Russian, which could only mean consider, was reconciled with the other versions on the basis of the “common denominator which answers the meaning of all the texts stated to be authenticated originals by the Parties.” The Commission found that the Russian “considered” was the broader term and included those who had been “treated.” Therefore, treated was the proper term corresponding to a common meaning. In fact, the reverse seems to be more likely: all those who are treated as enemy nationals must first be considered as such, whereas the opposite is not necessarily true. The Russian therefore corresponds to the common denominator.

For its part, the ICJ has stated that the “first duty” of a tribunal called upon to interpret and apply the words of a treaty “is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.”<sup>91</sup> This implies, as Lauterpacht states, that

[i]t is . . . legitimate to insist, in the interest of good faith and of a requisite minimum of certainty in legal transactions, that the burden

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88. 1 DAVID P. O'CONNELL, *INTERNATIONAL LAW* 258 (2d ed., 1970). Oppenheim also claimed that a party is only bound, in case of divergent meaning between two texts, by the version drawn up in its own language and cannot claim the benefit of the text drawn up in the language of the other party. OPPENHEIM, *supra* note 18, 956-57.

89. Hardy, *supra* note 16, at 117.

90. *Flegenheimer Case*, 14 REP. INT'L ARB. AWARDS 327 (Ital.-U.S. Conciliation Commission, 1958), U.N. Sales No. 65.v.4 (1958).

91. Admission of a State to Membership in the United Nations, 1950 I.C.J. 8 (Mar. 3).

of proof should rest upon the party asserting that the term in question is used not in its common but in its technical or in an unusual connotation or that the 'clear meaning' is not what on the face of it it appears to be.<sup>92</sup>

As the ICJ has interpreted treaties, the context, object, and purpose are important when the ordinary meaning is different in two or more equally authoritative texts. The emphasis on context makes it clear, as Bernhardt notes, that today "the often-invoked rule that treaties should be interpreted restrictively and in favour of State sovereignty can no longer be considered valid."<sup>93</sup> Indeed, during the drafting of the Vienna Convention on the Law of Treaties, the International Law Commission rejected including a presumption that would favor the narrower, more restricted meaning to reconcile different language versions.<sup>94</sup>

Other international tribunals approach the question of interpreting multilingual treaties with much greater emphasis on the aim of the treaty in question. The European Court of Human Rights, in its cases decided prior to the adoption of the Vienna Convention on the Law of Treaties, referred to the legal order established by the European Convention on Human Rights:

Thus confronted with two versions of a treaty which are equally authentic but not exactly the same the Court must, following established international law precedents, interpret them in a way that will reconcile them as far as possible. Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.<sup>95</sup>

After adoption of the Vienna Convention, the European Court explicitly relied on it to interpret the French and English versions of Article 6(1),<sup>96</sup> although the Court still sought to give effect to the right protected in the article. The aim of protecting human rights is again

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92. 4 HERSCH LAUTERPACHT, *INTERNATIONAL LAW, COLLECTED PAPERS* 401 (Elihu Lauterpacht ed., 1978).

93. Rudolf Bernhardt, *Interpretation in International Law*, in 7 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 318, 323 (Rudolf Bernhardt ed., 1984)

94. ILC Commentary, *supra* note 5, art. 29, para. 8.

95. Wemhoff Case, 7 Eur. Ct. H.R. (ser. A) para. 8, at 23 (1968). *See also* Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium (Merits), 9 Eur.Ct.H.R. (ser. A) para. 10 (1968); Ringeisen Case, 13 Eur.Ct.H.R. (ser. A) paras. 85-88, at 36-37 (1971).

96. Golder Case, 18 Eur.Ct.H.R. (ser. A) paras. 30-36, at 16-18 (1975).

seen in the *Sunday Times* case, where the Court says that: "[C]onfronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a way that reconciles them as far as possible and is most appropriate in order to realize the aim and achieve the object of the treaty."<sup>97</sup>

The European Court of Justice also takes a teleological approach, much more than sanctioned by the Vienna Convention. It frequently looks to the underlying object and purpose of the provision in question, rather than taking a strictly textual approach. In *Stauder v. City of Ulm*,<sup>98</sup> the Court was faced with inconsistent language in the French and German versions of a Commission decision on the distribution of subsidized butter to welfare recipients in Member States. The French version, which was the original text, required the recipient to produce a coupon "bon individualisé" while the German demanded "einen auf ihren Namen ausgestellten Gutschein."<sup>99</sup> A German plaintiff contested the latter requirement, objecting to having to reveal his name and welfare status. The ECJ upheld the necessity for uniform application and accordingly for uniform interpretation of matters addressed to all the Member States. In its view, all versions of the relevant text need to be considered in order to ensure this uniform application. Such interpretation must be "on the basis of both the real intention of author and the aim he seeks to achieve, in the light in particular of the versions in all four languages."<sup>100</sup> The Court concluded that "[i]n a case like the present one, the most liberal interpretation must prevail, provided that it is sufficient to achieve the objectives pursued by the decision in question."<sup>101</sup> Liberal in this case must be taken to mean the interpretation that favors the individual, although it is not always clear what the Court means by "liberal" interpretation, particularly in construing a text that has multiple objectives, some of which may be seen as incompatible.<sup>102</sup>

In *Regina v. Bouchereau*<sup>103</sup> the Court restated its basic approach: "The different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by refer-

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97. *Sunday Times*, 30 Eur. Ct. H.R. (ser. A) para. 48, at 30 (1979).

98. Case 29/69, *Stauder v. City of Ulm*, 1969 E.C.R. 419.

99. 1969 E.C.R. at 424.

100. *Id.* at 424-25.

101. *Id.*

102. For example, it is not clear which EU objective and purpose prevails in a text concerned with free movement of goods and protection of the environment.

103. Case 30/77, *Regina v. Bouchereau*, 1977 E.C.R. 1999, 1 C.M.L.R. 800 (1977).

ence to the purpose and general scheme of the rules of which it forms a part."<sup>104</sup>

The emphasis on object and purpose can extend to contradicting the plain meaning of terms.<sup>105</sup> The Court has expressed its concern for legal certainty in these cases where interpretation of one or more of the texts may vary the natural and usual meaning of the words. It thus suggests that "it is preferable to explore the possibilities of solving the points at issue without giving preference to any one of the texts involved."<sup>106</sup> In this regard, the ECJ has been seen to disfavor a language version that it feels departs from the common approach of other versions.<sup>107</sup>

In regard to the different meanings of terms, the ECJ has emphasized that "legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States."<sup>108</sup> Consequently, the Court encourages national courts to make frequent referrals under Article 177; it observes that "Community legislation is drafted in several languages and . . . the different language versions are all equally authentic. An interpretation of a provision of Community law thus involves a comparison of the different language versions."<sup>109</sup>

The Court is composed of a judge from each member state, thus ensuring knowledge of each language and legal system. In addition, the Court is supported by a language division with translators and interpreters for oral proceedings. In spite of this, the ECJ, like the other international tribunals, has been confronted with considerable problems in interpreting multilingual texts.

While the practice of international tribunals just described demonstrates divergent approaches to interpreting multilingual treaties, the Vienna Convention on the Law of Treaties attempts to set forth common principles of treaty interpretation.<sup>110</sup> The President of the Vienna Conference noted that "la question de l'interprétation des

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104. *Id.*

105. See Case 9/79, *Worsdorfer v. Raad van Arbeid*, 1979 E.C.R. 2717, 2724-25, 1 C.M.L.R. 87, 92-93 (1980), where the Court concluded that the word wife must include the word husband.

106. Case 80/76, *North Kerry Milk Products Ltd. v Minister for Agricultural Fisheries*, 1977 E.C.R. 425, 2 C.M.L.R. 769, 781 (1977)

107. See *Pescatore*, *supra* note 33, at 997-98.

108. Case 283/81, *Srl CILFIT v. Ministry of Health* 1982 E.C.R. 3415, 3430.

109. *Id.* 1982 E.C.R. at 3430, sec. 18, [1983] 1 C.M.L.R. at 491(1983).

110. Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention].

traités . . . est l'une des plus controversées et des plus difficiles de tout le droit des traités."<sup>111</sup> Perhaps due to this, an analysis of Articles 31-33 and their drafting history reveals a reluctance to set forth rigid canons of interpretation, supporting the variations seen in international jurisprudence.<sup>112</sup>

The Convention attempts to unify or combine three different approaches to treaty interpretation: textual, intentional, and functional. While these are based on enough practice of states to be considered as a codification, their hierarchical order undoubtedly contains elements that must be viewed as progressive development of international law.<sup>113</sup> Article 31 establishes the primary rule of treaty interpretation: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."<sup>114</sup> The context is important in deciding if apparently clear language is really that clear. The fourth paragraph provides that "A special meaning shall be given to a term if it is established that the parties so intended." Article 32 provides for recourse to the preparatory work of the treaty and the circumstances of its conclusion when application of the primary rule leaves the meaning ambiguous or obscure or a result that is manifestly absurd or unreasonable.<sup>115</sup> It is worth noting that the supplementary means in Article 32 are not exhaustive. The article mentions the most important, but leaves open the means of interpretation that can shed light on the meaning of the treaty. In this context, certain maxims and adages may be relevant.

Article 33 specifically addresses the interpretation of multilingual treaties. Article 33 provides:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

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111. La Conference des Nations Unies sur le Droit des Traites, Deuxieme Session 62, no. 77, quoted in Mustafa Kamil Yasseen, *L'Interpretation des traites d'apres la Convention de Vienne sur le Droit des Traites*, 151 RECUEIL DES COURS 1, 15 (Hague Academy of International Law 1976-III). (The English translation reads: the question of interpretation of treaties is one of the most controversial and difficult of all of the law of treaties.)

112. Vienna Convention arts. 31-33, *supra* note 110, 1155 U.N.T.S. at 340, 8 I.L.M. at 691-93.

113. Yasseen, *supra* note 111, at 16.

114. Vienna Convention, art. 31, *supra* note 110, 1155 U.N.T.S. at 340, 8 I.L.M. at 691-92.

115. Vienna Convention, art. 32, *supra* note 110, 1155 U.N.T.S. at 340, 8 I.L.M. at 692.



2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

This rule gives primary importance to efforts to reconcile the different texts so far as they are authentic. As the Commission noted, "the text of the treaty must be presumed to be the authentic expression of the intentions of the parties and . . . elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation."<sup>116</sup> Official or unofficial translations have no authority.<sup>117</sup>

During ILC discussions, proposals to favor one of the texts, *e.g.*, a clear text over an ambiguous one, were rejected "because [such a rigid rule] might not always be the correct solution."<sup>118</sup> Unfortunately, the ILC also rejected the common sense suggestion of Verdross that if a meaning reconciling the divergent terms could not be found, "the language to be considered should be that in which the treaty had been drawn up."<sup>119</sup> Nonetheless, as Ago noted, reference may be made to preparatory works and the circumstances under which the treaty is concluded where a textual conflict cannot be reconciled by reference to the plain meaning of terms.<sup>120</sup> With linguistic differences this will often be the case.

The ILC draft presented to the Vienna Conference did not refer to the "object and purpose" of the treaty in the final paragraph of present Article 33. The concluding phrase was adopted as an amend-

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116. ILC Commentary, *supra* note 5, arts. 27 & 28, para. 18.

117. A provision that would allow resort to nonauthentic texts when all other methods of interpretation failed to resolve an inconsistency was abandoned "on the grounds that it might open the door to too wide a reference to secondary versions of the treaty." *Summary Records of the Sixteenth Session* [1964] 1 Y.B. Int'l L. Comm'n 319, para. 57, U.N. Doc. A/CN.4/Ser.A/1964.

118. *Id.*

119. *Summary of the Second Part of the Seventeenth Session*, [1966] 1(2) Y.B. Int'l L. Comm'n 208-10, paras. 5, 22, 33, U.N. Doc. A/CN.4/Ser.4/1966; *see also id.* at 217, para. 44.

120. *Id.* para. 22.

ment submitted by the representative of the United States.<sup>121</sup> The result is that the object and purpose of the treaty are considered twice, first in determining the meaning of terms according to Article 31 and again if recourse to both primary and supplemental means of interpretation fail to reconcile the divergence in the texts. The final version of Article 33 was adopted unanimously by the Conference.

Article 33 creates a rebuttable presumption that the terms of a treaty are intended to have the same meaning in each authentic text. Therefore, a common meaning should be sought, a meaning that gives effect to the intent of the parties by application of the Article 31 principles of treaty interpretation. As the examples included above demonstrate, this presumption will often be rebutted due to translation errors or other drafting problems. In such case, the supplementary aides to interpretation contained in Article 32 may be used. In this situation, the proposal of Verdross may be utilized: it is logical to give preference to the language of the negotiating text on the basis of which agreement was reached, rather than that of subsequent translations. In the event there were multiple language negotiating texts, reconciliation through reference to the object and purpose of the treaty is appropriate.

## VI. Suggestions and Conclusion

A review of recent treaty practice indicates that too little attention is being devoted during negotiations to ensuring that treaties are concluded with concordant texts in the authentic languages. Translations are sometimes undertaken after the completion of negotiations when negotiators are no longer present. States may not review the concordance of all language versions sent after the fact. Where authentic texts are negotiated simultaneously, proposals for substitution of terms in one language or another may reflect a deliberate effort to change the meaning of a text. Ambiguities and divergence may also reflect underlying lack of agreement. Changes in drafting practices could help to avoid or reconcile discordant versions of treaties, especially if supported by preference for the negotiating text in treaty interpretation. In some cases, it may be impossible to reconcile the texts due to the fact that no real agreement was reached on substance during the negotiations. In such cases, interpretation should not result in drafting an agreement where none was reached by the negotiators.

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121. *U.N. Conference on the Law of Treaties, Proposals and Amendments Submitted to the Committee of the Whole* 151, U.N. Docs. A/CONF.39/C.1/L.197 & L. 269.

In drafting, it would be preferable to limit the number of authentic languages, making greater use of the distinction between authentic and official languages. The more complex the negotiations, the more states that are involved, the more nonlawyers or nonspecialists are involved in drafting, the greater the risk of linguistic errors, a problem compounded with each additional language. Whatever the number of languages in use, negotiating delegations should include members fluent in the languages in which the text will be authenticated. It is also important to improve the drafting of international legal texts in general.

Once a text is concluded, states' parties and international tribunals may find several different approaches required in using the textual approach to treaty interpretation, to take into account different problems that arise. First, where all the languages are ambiguous and open to several interpretations, seeking the common denominator is probably appropriate, giving effect to all the texts by adopting a single interpretation applicable to all.

Where one version is clear and the others are ambiguous, the clear one may apply so long as it does not contradict the others or the object and purpose of the treaty. By combining the possible expressions in the different languages, the core meaning may be found. It is normal to give preference to the clearest and most precise version, even where this results in preference for a single version.

Where there is no common meaning and the treaty negotiations are conducted in only one language or several languages, greater recourse should be had to the "original" language or languages to reconcile differences between authentic texts. Although treaties do not usually state what is the original language, it can happen.<sup>122</sup> Article 33(4) does not exclude recourse to the history of the negotiations as a supplementary means of interpretation, although recourse to drafting history must overcome the presumption that the full intent of the parties is found in the text that is adopted and that the words used in different languages have the same meaning. References to extrinsic evidence, including the preparatory work and the negotiating original text may be very useful. Even where the equality of texts is proclaimed, the result of a comparison may leave an absurd or irreconcil-

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122. For an early example, see the Treaty of Amity and Commerce between France and the United States, signed at Paris on Feb. 6, 1778, *reprinted in* 2 HUNTER MILLER, TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 27 (1931) (declaring their signatures of both the French and English texts, but the fact that the original was composed and concluded in the French language.).

able difference. It is only normal that favor should be given to the original version, the basis on which the negotiators in fact first reached agreement.<sup>123</sup>

The evidentiary value of the original will depend on the kind of negotiating process utilized. During the Law of the Sea Conference, several delegates suggested that since "all the negotiating texts from the single negotiating text onwards had been presented originally in English, and English was the language in which most of the negotiations in the Conference had been conducted," the English version of the Convention should enjoy a special status.<sup>124</sup> However, the other versions were carefully drawn up by the negotiators having reference to all the texts; they were not mere translations of the English. Thus, the weight of the original language is less. In other international law-making, including preparation of the Vienna Convention on the Law of Treaties, language versions are often prepared by the Secretariat.<sup>125</sup> Where the negotiators do not participate in translating the text, the deference given the original negotiated text should be considerably greater.<sup>126</sup>

Technical terms may prevail over general ones, especially in the use of legal terms. In the *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* arbitration,<sup>127</sup> the panel found a "notable discrepancy" between the French and English texts of the relevant provision

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123. Contra the *Young Loan* arbitration ("referring to the basic or original text as an aid to interpretation is now, as a general rule, incompatible with the principle, incorporated in Article 33(1) of the [Vienna Convention on the Law of Treaties], of the equal status of all authentic texts in plurilingual treaties"). 59 INT'L LAW REP. 529-30 (1980).

124. Provisional Summary Record of the 160 Plenary Meeting, Observation of the Israeli delegate, 17 UNCLOS, *supra* note 44, para. 16, at 416; accord United States, A/CONF.62/SR.136 (1980), para. 128.

125. In the International Law Commission work on the law of treaties, the Drafting Committee was responsible for the text of the draft articles in each of the working languages of the International Law Commission and the General Assembly: English, French and Spanish. The Secretariat staff prepared the Russian and Chinese texts of the draft articles and all the Commentaries other than the English original. Concordance of the five language versions was entrusted to the Drafting Committee of the Vienna Conference. Corrections were submitted to the conference's language services before being incorporated in the text of the language to which it applied. The Secretariat was also invited to examine the texts of the articles in all five languages, with the help of the language services, prior to the second session of the conference in order to facilitate the work of the drafting committee. ROSENNE, *supra* note 6, at 70-71. The Hamburg Rules also were drafted in English then translated by language experts from the United Nations into all the official languages. *Panel Discussion—Litigation with a Foreign Flavor: A Comparison of the Warsaw Convention and the Hamburg Rules*, 59 J. AIR L. & COM. 907, 938 (1994).

126. See the dissenting opinion in the *Young Loan* arbitration, *supra* note 123, at 584.

127. 2 REP. INT'L ARB. AWARDS 777, 792 (U.S.-Reparation Commission, 1949).

of Annex II to the Treaty of Versailles. Where the English text referred to "legal or equitable interests," the French used the expression "droits et interets legitimes," which had no specific legal meaning. The tribunal concluded that the French text was a translation of the English and better suited the context. Of course, the difficulty with applying legal terms in a single language is that they often reflect legal concepts or doctrines not known in some of the legal systems of parties to the treaties.

Finally, while recourse to drafting history may assist in appreciating the meaning of the text that was adopted, it is also likely to demonstrate a lack of agreement in some instances. It is clear that language problems sometimes arise because there is no common intent, but rather diverse intentions reflected in inconsistent texts, ambiguities or lacunae. Where there are deliberate ambiguities masking substantive disagreement, it may be appropriate to leave the negotiators in the position they created, by finding there is no means to reconcile the texts or give meaning to the "obligation."

In sum, the problems of interpreting multilingual treaties arise in a variety of circumstances. Some problems may be limited by greater care in drafting and translating, some can be remedied through applying principles of treaty interpretation. Overall, however, the problems will not be eliminated while communication from one person to another and one society to another is accomplished through recourse to the variety of human languages. With the benefits of linguistic diversity inevitably come misunderstandings and ambiguities. Greater knowledge and use of several languages can help minimize these problems, but differences—reconcilable and irreconcilable—will remain as long as the richness of global cultural diversity continues to be expressed in treaties authenticated in several languages.